In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 25

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ADAMS DAIRY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN REPLY TO SUPPLEMENTAL BRIEF OF RESPONDENT

In our petition for certiorari, we pointed out that this case presents the same basic substantive question as *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, No. 14, this Term, decided December 14, 1964, but in a different factual context, and that it was appropriate that the Court resolve the problem in both contexts. In its supplemental brief, filed after the Court's decision in *Fibreboard*, respondent, elaborating on the factors which it noted earlier (see Brief in Opposition, p. 8), argues that, in view of the factual differences between the two cases, *Fibreboard* is not dispositive and is not incon-

760-715—65

sistent with the decision of the court of appeals in the present case. Although we agree that *Fibreboard* is not directly controlling, we submit that its rationale is equally applicable to the present case; and, in any event, that the limited scope of the decision in *Fibreboard* makes further review in this case appropriate.

In *Fibreboard*, the Court held that the "type of 'contracting out' involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8(d)" (slip op., p. 11; see *id.*, p. 7). In the present case the respondent dairy entered into agreements with independent contractors under which each of them undertook to distribute to retail outlets the milk that previously had been distributed by respondent's employees. The case is thus distinguishable from *Fibreboard* only in that here the respondent's employees were not replaced by employees of an independent contractor, but by the "contractors" themselves. It is similar, however, in that in both cases new labor was substituted for existing employees who had performed, and were willing to continue to perform, the work involved. We believe that the Court's reasoning in *Fibreboard*—as distinguished from its narrow holding—applies equally to the present case and compels the conclusion that the "type of 'contracting out'" here involved also is a statutory subject of collective bargaining. Indeed, *Fibreboard* relied upon *Local*

24, Teamsters Union v. *Oliver*, 358 U.S. 283, which included contracting out of the kind involved in the present case.

Moreover, since the type of contracting out involved in this case is not uncommon in the wholesale and retail trades, it is desirable that this Court determine whether the collective bargaining requirement of the Act applies to such activity. Indeed, in view of the references to the present case in the concurring opinion in *Fibreboard* (slip op., notes 7 and 11), the denial of certiorari in the present case inevitably would lead to further litigation on the question. The caveats in *Fibreboard* require further definition of the scope of the duty of employers to bargain collectively with respect to contracting out in other situations.[1]

Finally, as indicated in the petition (pp. 9–10), here the contracting out occurred during the term of

[1] Contrary to respondent (Supplemental Brief, pp. 2–3), the situation here is not just as though an employer, for economic reasons, had completely discontinued one phase of his business. To be sure, under the independent distributorship system, respondent no longer owned the delivery equipment and it vested the distributors with enough freedom over their operation to make them independent contractors rather than its employees. But, at the same time, respondent continued to regard the distribution system as an integral part of its milk business. It required the independent distributors, *inter alia*, to maintain certain standards of efficiency and sanitation. Moreover, notwithstanding the change in method of distribution, about 80 percent of respondent's milk continued to be delivered to Kroger and A & P stores (R. 14, n. 7; 100–101). The independent contractor in *Fibreboard* was also vested with substantial control over the maintenance operation; see Record in No. 14, this Term, pp. 160–163.

a collective bargaining agreement. Although the contract did not mention the subject, the Union during negotiations had proposed, and the Company had rejected, a provision limiting the Company's right to assign the work of its driver-salesmen to independent contractors (but there were no indications in the negotiations that the Company contemplated eliminating its driver-salesmen entirely). This factor raises further issues concerning the obligation to bargain about contracting out which are likewise of importance in the administration of the Act.

For these reasons, as well as those set forth in the petition, the petition should be granted.[2]

Respectfully submitted.

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JANUARY 1965.

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[2] It should also be noted that the decision of the court below rests in large part on the erroneous premise that there was no duty to bargain here because the Company was not motivated by anti-union considerations (Pet., pp. 17–29). This Court's decision in *Fibreboard* shows that that factor is irrelevant.

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